

REVIEW ON THE RECORD DECISION

PURSUANT TO SECTION 141 POLICE ACT, R.S.B.C 1996, c.267

In the matter of the Review on the Record into the Ordered Investigation against Sergeant Peter Gill (retired) of the Victoria Police Department

To: Sergeant Peter Gill #136 (retired) ("Former Member")

And to: Inspector Colin Brown ("Discipline Authority")

And to: Brian Smith ("Counsel to the Commissioner")

And to: Chief Constable Del Manak

Executive Summary

A duty of fairness applies to all administrative bodies. The extent of the duty depends on the particular tribunal's nature and function. The duty to act fairly includes the duty to provide procedural fairness to the parties. Procedural fairness cannot exist if the adjudicator is biased. Because it is impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision, an unbiased appearance is an essential component of procedural fairness. The test to ensure fairness is whether a reasonably informed bystander would perceive bias on the part of the adjudicator. The damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it must be void.

The initial issue to be determined on this Review is whether apparent bias existed when Inspector Brown was delegated the role of Discipline Authority by Victoria City Police Chief Constable Manak. The issue arises because Inspector Brown initiated the complaint to the OPCC. In his request for an Ordered Investigation, Inspector Brown asserted that the release of a confidential police document would amount to misconduct. At the time of his request Inspector Brown was a senior officer in the Victoria Police Department ("VicPD"). Mr. Gill was then a Sgt. in the same department, on medical leave. In November 2022, then Sgt. Gill had granted an interview to a reporter from the Capital Daily who subsequently wrote an article quoting Mr. Gill extensively. The article, ostensibly about PTSD, raised serious questions about senior leadership in the VicPD. The article contained allegations of bias and dysfunction within the department. In his correspondence requesting the Ordered Investigation, Insp. Brown outlined the misconduct he believed had occurred. He did not initially name Mr. Gill, but it would have been clear to him that Mr. Gill was a prime suspect.

I have concluded that a reasonably informed bystander familiar with the background of Mr. Gill's relationship with the Victoria City police and Inspector Brown's role in initiating the Ordered Investigation would perceive bias on the part of Inspector Brown when he assumed the role of Disciplinary Authority. If the Discipline Proceeding against Mr. Gill is void in law it cannot be correct.

Introduction

1. On August 9, 2024 the Police Complaint Commissioner ordered a Review on the Record at the request of retired Victoria Police Department ("VicPD") Sgt. Peter Gill ("Mr. Gill").
2. On April 14, 2024 Inspector Colin Brown ("Insp. Brown"), acting as the Discipline Authority, concluded that Mr. Gill had given a reporter copies of documents from a prior *Police Act* discipline process. The documents in question included the name and medical information

of an affected person along with other sensitive personal information. The Discipline Authority found that disclosing this information amounted to neglect of duty to keep the material confidential, and as a disciplinary measure proposed a reduction in rank from Sgt. to First Class Constable. The discipline proceedings were initiated by Insp. Brown on March 7, 2023 when he wrote to the Office of the Police Complaint Commissioner, in his capacity as a senior member of the VicPD, requesting an Ordered Investigation into the conduct of unknown members of his department pursuant to section 93 (1) of the Police Act. After some investigation Mr. Gill was identified as the member subject to discipline. Mr. Gill retired shortly after the investigation into his conduct began.

3. Where a Discipline Authority proposes a reduction in rank or dismissal, the member has the right to request either a public hearing or a Review on the Record. The Police Complaint Commissioner determined that a Review on the Record was appropriate and I was appointed to preside as Adjudicator under sections 142(1)(2) of the *Police Act*. For a variety of reasons Mr. Gill chose not to participate in either the investigation or the subsequent disciplinary proceedings. He was not represented by a lawyer, but did have a union representative appear as his agent. He did not provide a statement to the investigating member, nor did he testify at the disciplinary proceeding.
4. Mr. Gill asks that the Discipline Authority's decision be set aside, arguing that the discipline process was biased and discriminatory and the outcome disproportionate and punitive. Mr. Gill has chosen to represent himself on this Review.

Standard of Review and The Record

5. The standard to be applied in relation to the review of a discipline decision under section 141 of the *Police Act* is correctness as expressly stated in section 141(9). The test for the standard of correctness supplied by the Supreme Court of Canada in **Dunsmuir v. New Brunswick**, 2008 SCC 9 at para. 50, requires the reviewer to undertake a fresh analysis of the case, and substitute their view of the correct answer for the original decision, without requiring deference to the reasons of the decision-maker. The burden of proof is the balance of probabilities, which requires evidence that is sufficiently clear, convincing and cogent.
6. Further guidance is found in **Canada (Minister of Citizenship and Immigration) v Vavilov**, 2019 SCC 65 at para. 54:

[54] When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision makers determination or to substitute its own view: Dunsmuir at para 50. While it should take the administrative decision-makers reasoning into account-and indeed, it may find that reasoning persuasive and adopt it-- the reviewing court is ultimately empowered to come to its own conclusion on the question.

The Record

7. The Record before me in this Review consists of the Final Investigative Report (FIR), the Discipline Authority's decision made pursuant to section 125 of the *Police Act* and the Disciplinary Disposition Record made pursuant to section 128(1)(b) of the *Police Act*. The FIR

also includes the documents Mr. Gill was found to have disclosed to the media [the Final Investigative Report from OPCC file 2018-15338 and the Discipline Authority's decision in that case]. The Final Investigative Report in OPCC file 2018-15338 relates to an incident alleged to have occurred in 2018 that resulted in allegations of misconduct involving four members of the VicPD. An external disciplinary authority was designated by the Commissioner to conduct the discipline proceedings. The FIR authored by a member of the Delta Police Department is extensive.

8. The Record also includes articles from the Capital Daily, including an article written by Mr. Lo approximately the same day that he sent an email to the VicPD attaching the FIR that related to the 2018 incident. The Record also includes a November 2022 article on PTSD written by Daily Capital reporter Ms. Marlan.

Background and History

9. On March 7, 2023, Insp. Brown of the VicPD submitted a Request for An Ordered Investigation to the Police Complaint Commissioner. In his request, Insp. Brown indicated that on February 17, 2023 the VicPD received an email from a Capital Daily newspaper reporter, Mr. Lo, attaching a copy of a FIR involving members of the VicPD in an incident that resulted in a *Police Act* investigation [OPCC file 2018-15338]. This file was externally assigned to the Delta City Police for investigation.
10. The February 17, 2023 email from Mr. Lo also addressed the issue of notetaking and asked if the VicPD had instituted changes to its notetaking policy. Mr. Lo had authored an article published in the Capital Daily entitled "Recovered police notebook raises questions about VicPD policy". In the article, Mr. Lo reported that the VicPD had recently revealed that an officer's lost notebook may have played a part in an alleged crime. Mr. Lo went on to write that the 2019 FIR from OPCC file 2018-15338 ("the 2019 FIR") suggested four note-keeping practices be added to VicPD's notebook policy and attached the 2019 FIR in support of his inquiry as to whether the suggested additions had occurred.
11. The 2018 incident which led to the *Police Act* Investigation [OPCC file 2018-15338], and that resulted in the 2019 FIR disclosed to the VicPD by Mr. Lo, involved an incident where a VicPD police dog bit an affected person outside an emergency shelter. Mr. Gill had attended the scene in his capacity as Road Sgt. at the request of the dog handler. The incident, and perceived discrepancies in reporting about whether the bite had been directed or accidental, eventually resulted in investigations of possible misconduct by the dog handler, Mr. Gill, and two other VicPD officers.
12. The incident was investigated by a member of the Delta Police Department who authored the subsequently disclosed 2019 FIR, recommending substantiation of all counts of misconduct against all four officers as well as recommendations about note keeping since a number of pages in the dog-handler's notebook had been removed.
13. In his request for an ordered investigation, Insp. Brown submitted that the 2019 FIR was a confidential document and its disclosure to the media (disclosure of a *Police Act* document) could amount to the offence of Discreditable Conduct pursuant to section 77(3)(h) of the *Police Act* as the disclosed FIR contained serious allegations, some of which were not

substantiated by the Discipline Authority. The document Insp. Brown sent to the OPCC requesting an Ordered Investigation is not in the record.

14. On March 22, 2023 the Police Complaints Commissioner issued an Order for Investigation citing “unknown members” and expressed the opinion that the conduct alleged against the unknown members in releasing confidential information, if substantiated, would constitute misconduct.
15. Sgt. Leblanc was assigned as the investigator. After a number of inquiries, Sgt. Leblanc concluded that there was sufficient evidence to indicate that Sgt. Gill disclosed the 2019 FIR. Sgt. Gill was one of the four Victoria police officers involved in the earlier *Police Act* investigation. Having concluded that Sgt. Gill disclosed the information, Sgt. Leblanc contacted the OPCC and requested an Amended Order of Investigation identifying Sgt. Gill as the potential respondent member. On October 5, 2023 the OPCC issued the requested amendment naming Sgt. Gill.
16. In his request for the Amended Order for Investigation, Sgt. Leblanc also concluded that Sgt. Gill had released “Notice of Decision After a Discipline Proceeding” from *Police Act* OPCC file 2018-15338 (“the 2021 Decision”) to Ms. Marlan, a colleague of Mr. Lo at Capital Daily, who had authored an extensive article on PTSD in November 2022. The article contained serious allegations concerning the workplace environment at the VicPD and quoted former members of the department, in addition to Sgt. Gill. At the time the article was published Sgt. Gill was still serving, but on medical leave, as a result of a workplace injury. Sgt. Gill was the only one of the four Victoria City Police officers involved in the 2018 *Police Act* investigation quoted in the article. The inference was that Sgt. Gill had provided both the 2019 FIR and the Notice of Decision to Ms. Marlan when she interviewed him for the November article, and she in turn had given the information to her colleague Mr. Lo.
17. On October 26, 2023 pursuant to section 134 of the *Police Act* VicPD Chief Constable Manak delegated the role of Discipline Authority to Insp. Brown of his department.
18. On November 2, 2023 Mr. Gill forwarded a letter from his doctor. In the letter the doctor stated that he had been treating Mr. Gill for PTSD related to a workplace injury since March 2021. He wrote that he understood that Mr. Gill was in a potential dispute with his employer and may be required to make formal statements that could “have a significant impact on his future prospects of employment”. The doctor added that because of Mr. Gill’s medical condition, he did not believe it would be appropriate for Mr. Gill to provide such statements at this time.
19. On November 6, 2023 Sgt. Gill retired from the VicPD. Once he retired from the VicPD, Mr. Gill no longer had an expressed legal obligation under section 101 of the *Police Act* to cooperate with the ongoing investigation. Sgt. Leblanc reached out to Mr. Gill to confirm whether or not he would participate in the investigation. Mr. Gill initially cited medical reasons for declining to participate. In the ensuing months he expressed other reasons, but never ultimately participated in the initial investigation. He did not provide a statement or answer any questions.

20. On January 8, 2024 Sgt. Leblanc submitted the Final Investigative Report (FIR) to Insp. Brown. There was an issue concerning whether or not (now retired) Sgt. Gill received correspondence from Sgt. Leblanc and the first FIR was rejected by Insp. Brown in his role as discipline authority. A supplemental FIR was accepted by Insp. Brown, on February 20, 2024. The investigating officer, Sgt. Leblanc, found on a balance of probabilities that Mr. Gill provided the 2019 FIR and 2021 Decision to the media, and in so doing neglected his duty contrary to s 77 (3) (m) (ii) of the *Police Act*.
21. On March 4, 2024 the Discipline Authority Insp. Brown determined that the supplemental FIR appeared to substantiate the Misconduct allegation of “Neglect of Duty”. A Discipline Hearing was set for April 2, 2024.
22. Mr. Gill did not participate in the Discipline Hearing. His agent filed a 60-page document containing complementary community letters and commendations as well as reference letters. Section 130 of the *Police Act* allows a Disciplinary Authority to proceed in a member’s absence, and to draw an adverse inference based on the member’s nonparticipation, if satisfied the member received notice of the hearing. The Discipline Authority Insp. Brown was satisfied that Mr. Gill advised his union agent that he would not attend the discipline proceeding either in person or remotely. Ultimately, the Disciplinary Authority found that the misconduct alleged was substantiated and that the appropriate disposition was a reduction in rank from Sergeant to Constable.
23. Section 141 (4) provides that the Adjudicator may, on a Review on the Record where there are special circumstances, and it is necessary and appropriate, receive evidence that is not part of either the record of the disciplinary decision concerned or the service record of the member or former member. Mr. Gill did not ask to file any additional evidence.

The November 2022 Daily Capital Article

24. The November 2022 Daily Capital article authored by Ms. Marlan provides some context in terms of Sgt. Gill’s relationship with the VicPD.
25. In the article, Ms. Marlan cites a 2021 study co-sponsored by VicPD senior management and the Victoria City Police Union on mental health and well-being in the department. The study had a 79% response rate and found that 20% of the VicPD’s 249 officers were on leave, many as a result of mental health challenges. Of concern, the majority of officers who participated described their workplace culture in negative terms, using such words as toxic, micromanaged and crumbling, and 69% of the officers who responded said the department does not have a “respectful workplace”. The study reported discontent between the department’s senior leadership and members. Officers reported feeling unsupported and undervalued.
26. Sgt. Gill, while on medical leave from the department, identified as suffering from PTSD. He told the reporter that he felt “utterly, utterly betrayed” by the department. He blamed organizational stressors, or workplace culture, more than traumatic exposures on the job, for his PTSD. Mr. Gill expressed frustration at being repeatedly denied promotion and attributed the denial to discrimination within the department.

Submissions

27. Mr. Gill, in his submissions, argued that his willingness to participate in the process was contingent upon the assurance of fairness and transparency, which did not exist in his case. In his view the fundamental principles of trust and equity have been undermined in his case. In his argument, Mr. Gill refers to a number of other decisions made under the Police Act, where Insp. Brown, as the Discipline Authority, authored decisions which Mr. Gill says were biased against BIPOC members. Mr. Gill also refers to other decisions where he alleges non-BIPOC members were treated leniently.
28. Mr. Gill refers to the November 2, 2022 article on PTSD published in the Capital Daily that outlined cronyism, discrimination and indifference towards officers suffering from post-traumatic stress disorder in the VicPD. Mr. Gill refers to his participation in that article as “whistleblowing” and states that his motivation to participate was due to the fact that he had made numerous, documented attempts to bring his concerns to the executive of the VicPD, but no meaningful change resulted. Mr. Gill notes that in the article specific references were made to decisions Insp. Brown made in *Police Act* matters that showed bias on his behalf, specifically when it comes to BIPOC members. Mr. Gill maintains that Insp. Brown should have recused himself.
29. In submissions the OPCC acknowledges Mr. Gill’s allegations of bias but argues that section 141 of the *Police Act* does not give the Adjudicator the power to review or revisit the decision made by the Commissioner to appoint VicPD to investigate and conduct the discipline proceeding. They argue that the Legislature has assigned responsibility for making those decisions to the Commissioner, not the Adjudicator. If Mr. Gill is not happy with the process conducted by VicPD his recourse is to utilize this Review on the Record to try to persuade me to set aside the decision and to substitute the one I feel is correct.

The Law

30. The Supreme Court of Canada has had occasion to deal with the issue of reasonable apprehension of bias in a number of cases involving administrative tribunals. In **Newfoundland Telephone Company Limited v, The Board of Commissioners of Public Utilities** [1992] 1 SCR 623 Mr. Justice Cory speaking for a unanimous court had this to say:

Administrative boards play an increasingly important role in our society. They regulate many aspects of our life, from beginning to end. Hospital and medical boards regulate the methods and practice of the doctors that bring us into this world. Boards regulate the licensing and the operation of morticians who are concerned with our mortal remains. Marketing boards regulate the farm products we eat; transport boards regulate the means and flow of our travel; energy boards control the price and distribution of the forms of energy we use; planning boards and city councils regulate the location and types of buildings in which we live and work. In Canada, boards are a way of life. Boards and the functions they fulfil are legion.

All administrative bodies, no matter what their function, owe a duty of fairness to the regulated parties whose interest they must determine. This was recognized in Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311.

Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal. See Martineau v. Matsqui Institution Disciplinary Board, [1980] 1 S.C.R. 602. The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the Board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient.

*Everyone appearing before administrative boards is entitled to be treated fairly. It is an independent and unqualified right. As I have stated, it is impossible to have a fair hearing or to have procedural fairness if a reasonable apprehension of bias has been established. If there has been a denial of a right to a fair hearing it cannot be cured by the tribunal's subsequent decision. **A decision of a tribunal which denied the parties a fair hearing cannot be simply voidable and rendered valid as a result of the subsequent decision of the tribunal. Procedural fairness is an essential aspect of any hearing before a tribunal. The damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it, is void.***

Analysis

31. I agree with the OPCC submissions that as an Adjudicator appointed under section 141 of the *Police Act* I have no power to review or revisit the decision of the Commissioner to appoint VicPD to investigate and conduct the discipline proceeding in this case.
32. However, at this initial stage the power of the Commissioner to appoint is not the issue. My task is to determine whether a reasonably informed bystander, in the circumstances of this case, could reasonably perceive bias on the part of the Discipline Authority, Insp. Brown.
33. On October 26th, 2023 Insp. Brown was delegated the role of Discipline Authority by his Chief Constable. On November 6, 2023 Sgt. Gill retired from the VicPD. On January 8, 2024 Sgt. Leblanc submits the first iteration of the Final Investigative Report to the Discipline Authority. Insp. Brown found himself in an impossible situation when he accepted the role of Discipline Authority. Not only was he a senior officer in the VicPD, but he was also the senior officer who wrote to the OPCC requesting an Ordered Investigation. In the request, he

outlined anticipated misconduct involving “unnamed members” of his department, but it must have been obvious to him that Mr. Gill was the prime suspect with respect to the release of the 2019 FIR. Not only was Mr. Gill one of the officers involved in the 2018 incident, he also would have been one of the four officers who received copies of the confidential information contained in the FIR. He was the only serving officer quoted in the newspaper article.

34. The designation of Insp. Brown as the Disciplinary Authority occurred approximately a year after the Article in the Daily Capital was published, containing serious allegations of dysfunction within the Victoria City Police. The Article was particularly critical of the senior leadership in that department. Then Sgt. Mr. Gill was extensively quoted with his observations concerning the Department’s leadership.
35. In his submissions, Mr. Gill makes a number of allegations concerning his relationship with Insp. Brown. He was highly critical of decisions that Insp. Brown made in his role as Disciplinary Authority in other cases. However, unless the facts outlined by Mr. Gill in his allegations are before me in the Record, I cannot consider them in this Review.
36. I make no finding of actual bias on the part of Insp. Brown. The issue before me is whether or not in the circumstances a reasonably informed bystander could reasonably perceive bias on the part of the adjudicator. I have concluded that a reasonably informed bystander would perceive bias on the part of the adjudicator in circumstances where the Adjudicator was also the de facto complainant who initiated the Ordered Investigation that resulted in the disciplinary proceedings against Mr. Gill. Moreover, Mr. Gill was public in his criticism of senior leadership in the VicPD, and that would include Insp. Brown. Given Mr. Gill’s troubled relationship with the VicPD, it would have been difficult indeed for that department to have conducted a disciplinary proceeding that would ensure the necessary procedural fairness. Tribunals that are primarily adjudicative in their functions are expected to comply with the standard applicable to courts. *Police Act* disciplinary proceedings are primarily adjudicative in their function.
37. I note that the 2018 dog bite incident that led to disciplinary proceedings against members of VicPD, including then Sgt. Gill, was investigated and discipline proceedings conducted by police departments other than the VicPD. Procedural fairness is an essential aspect of any hearing before a tribunal. The damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it, is void. If in law the matter is void it cannot be correct.



Signature of Adjudicator
Judge John (Jim) James Threlfall (rt.)

Date: November 25, 2024